LEGAL QUESTIONS INVOLVED IN NATIONALIZATION OF RATE REGULATION

By William E. Lamb

Any plan placing railroad rates under complete federal control will arouse discussion as to the power of Congress on the one hand and the rights of the states on the other. While the discussion may assume various forms and appear to cover numerous questions, yet all are included in one—the power of Congress to enact legislation that will completely nationalize rate regulation.

Since the decision of the Supreme Court in the Shreveport case,[1] the adherents of nationalization insist that the power of the federal government has been fully determined, and national regulation in the fullest sense is but a matter of choice in the form of the law. The opponents, however, vigorously deny that Congress possesses the necessary power and advance numerous reasons in support of their position, most of which, however, relate to the extent to which the federal government has exercised its powers in past or present legislation. In a measure they present questions of construction rather than questions of power. They directly challenge the federal power by asserting: (1) that each state has the absolute power to determine the amount of each rate to be charged for rail transportation between points within its borders; (2) that a transfer of that power is essential to complete federal control, which would require a constitutional amendment; (3) that the enforcement of the act to regulate commerce in harmony with the decision in the Shreveport case would result in a violation of the due process clause of the fifth amendment, a question not considered in the Shreveport case.

Views of Opponents of Complete Federal Control of Rates

As an analysis of that case appears in a previous chapter, it seems more appropriate first to present the views of the opponents of complete federal control, including without distinction those re-

[1] *Houston, East and West Texas Railway Company* v. *United States*, 234 U. S. 342.

lating to erroneous construction with those which assail the federal power.

It is claimed that the power of the states to legislate concerning their internal commerce is as full and complete as the power of the federal government, covering the field of interstate commerce which was clearly recognized and declared in all of the decisions of the Supreme Court, commencing with *Gibbons* v. *Ogden*[2] and ending with the Minnesota rate cases.[3] The statements in various decisions, as to lack of power in a state to enact legislation affecting interstate commerce, are said to have been aimed at state legislation which by its terms extended beyond the territorial limits of the state, though not including the resultant effect that legislation confined solely within the borders of the state might possibly have upon outside economic, commercial or transportation conditions. In *Gibbons* v. *Ogden*[4] the legislation considered directly regulated interstate commerce, and was not confined to commerce solely within the state, and it is said that Chief Justice Marshall's statement that the power of the federal government extended to all external concerns of the nation, and all internal concerns affecting the states generally "but not to those which are completely within a particular state which do not affect other states and with which it is unnecessary to interfere," must have referred to state legislation which by its terms extended beyond its boundaries.

The right of states to fix the charges of public service corporations was challenged in *Munn* v. *Illinois*.[5] It was claimed that the regulation applied directly to interstate commerce, as in the ordinary course of trade the grain from a number of states would pass through the elevators at Chicago, the charges therefor having been fixed by an act of the Legislature of Illinois which was assailed in the suit. The Court held that the act was not a direct attempt to regulate interstate commerce and called attention to the familiar rule that even though there might be indirect regulation of interstate commerce, until Congress had entered that field the power exercised by the state was not unlawful, and further stated that under the facts in the case there was no interference with interstate

[2] *Gibbons* v. *Ogden*, 9 Wheat. 1.
[3] *Simpson et al.* v. *Shepard*, 230 U. S. 352.
[4] *Gibbons* v. *Ogden*, 9 Wheat. 196.
[5] *Munn* v. *Illinois*, 94 U. S. 113.

commerce. The decisions involving the regulation of railroads within the states, decided about the same time, of which *Chicago, Burlington & Quincy Railroad Company* v. *Iowa*[6] and *Peik* v. *Chicago & Northwestern Railway Company*[7] are illustrative, indicate, so it is said, that the references in the several opinions to the reserved power in Congress applied to legislation which in form affected interstate commerce, but as to which Congress had not yet legislated, especially as the decision in the Peik case covered legislation of the State of Wisconsin establishing rates on traffic originating therein but destined to points outside, which the court held valid because Congress had not exercised its power as to transportation of that character.

Following these decisions there was general legislative activity on the part of the states providing for more complete state regulation of railroads. The statutes from time to time came before the court for construction, and in *Stone* v. *Farmers' Loan and Trust Company*[8] the court reiterated the doctrine that "the state may beyond all question by the settled rule of decision of this Court, regulate freights and fares for business done exclusively within the state, and it would seem to be a matter of domestic concern to prevent the company from discriminating against persons and places in Mississippi." These statutes did not by their terms extend to transportation or commerce outside their respective borders, but in *Wabash Railroad Co.* v. *Illinois*[9] the court declared an act of the legislature of that state, which actually covered transportation both inside and outside the state, to be valid, because the highest court of the state had construed the law to apply only to transportation within the state, but added that without such construction by the state court the act would have been a direct regulation of interstate commerce which the state was without power to enact, even though Congress had not undertaken to legislate on the subject. The doctrine of the Peik case, *supra*, which had evidently misled some of the state legislatures was thus repudiated.

[6] *Chicago, Burlington and Quincy Railroad Company* v. *Iowa*, 94 U. S. 155.
[7] *Peik* v. *Chicago and Northwestern Railway Company*, 94 U. S. 164.
[8] *Stone* v. *Farmers' Loan and Trust Company*, 116 U. S. 307–334.
[9] *Wabash, St. Louis and Peoria Railway Company* v. *Illinois*, 118 U. S. 557.

A long line of cases[10] involving the rights of states to fix rates followed the Wabash case, and in each the power of the states was in question, and in each it was decided that the action of the states did not cast a burden upon interstate commerce. It is now claimed that it was never suggested that Congress might possess the power to determine the amount of a rate for transportation between points wholly within a single state until the decision in the Minnesota rate cases. In that case, it is said, that no doubt was entertained at the time of the decision in the Wabash case, *supra*, as to the rights of states to regulate transportation that was wholly within their respective borders,[11] and after discussing the decision in that case this language appears in the opinion in the Minnesota rate cases: "The doctrine was thus fully established that the state could not prescribe interstate rates but could fix reasonable intrastate rates throughout its territory."[12] It is further stated that the power of the state to fix reasonable intrastate rates extends not only throughout the state but to cities adjacent to its boundaries, and in exercising that power it is not bound to adjust its rates to correspond with the interstate rates established by carriers.[13] The Court then states that if there is a restriction on state authority it must be by virtue of the paramount power of Congress over interstate commerce and its instruments.[14]

It is further said by the opponents of federal control, that in the Minnesota rate cases it was expressly decided that Congress had not, in the Act to Regulate Commerce, undertaken to interfere with the powers of the states to fix rates within their territorial limits,[15] although the court did say that discrimination as between state and interstate rates could only be determined by the Interstate

[10] *Dow* v. *Beidelman*, 125 U. S. 680; *Chicago, etc. Railway Company* v. *Minnesota*, 134 U. S. 418; *Chicago, etc. Railway Company* v. *Wellman*, 143 U. S. 339; *Reagan* v. *Farmers' Loan and Trust Company*, 154 U. S. 362; *Reagan* v. *Mercantile Trust Company*, 154 U. S. 413; *St. Louis and San Francisco Railway Company* v. *Gill*, 156 U. S. 643; *Smythe* v. *Ames*, 169 U. S. 466; *Minneapolis and St. Louis Railroad Company* v. *Minnesota*, 186 U. S. 257; *Alabama and Vicksburg Railroad Company* v. *Mississippi*, 203 U. S. 496; *Northern Pacific Railway Company* v. *North Dakota*, 216 U. S. 579.

[11] 230 U. S. 415.

[12] 230 U. S. 416.

[13] 230 U. S. 416–417.

[14] 230 U. S. 417.

[15] 230 U. S. 423, 431–432.

Commerce Commission. It is said that this statement, however, is not significant when it is borne in mind that until the decision in *Baltimore & Ohio Railroad Company* v. *United States*, ex rel. *Pitcairn Coal Co.*,[16] it had been generally believed that the act to regulate commerce permitted courts to pass upon the question of discrimination, and such power had been generally exercised by them. The lower court in the Minnesota rate cases had specifically held that the state-made rates discriminated against interstate commerce and the observation of the Supreme Court of the United States as to the original jurisdiction of the Interstate Commerce Commission to pass upon that question appears to have been an answer to the claim of power on the part of the lower court.

The foregoing in a general way covers the claims of the opponents of complete nationalization of rate regulation regarding the powers of the federal and state governments up to the time of the decision in the Shreveport case, which either overruled the previous decisions of the Supreme Court, or resulted in erroneous construction of the Act to Regulate Commerce as well as the commerce clause of the Constitution.[17]

They further contend that the Shreveport case, although holding that certain activities of the Interstate Commerce Commission under the Act to Regulate Commerce had interfered with the rights of the states, in no sense covers the question of the power of Congress to determine the amount of any rate for transportation between two points wholly within one state.[18]

It is pointed out that the reports of the Interstate Commerce

[16] *Baltimore and Ohio Railroad Company* v. *United States*, ex rel. *Pitcairn Coal Company*, 215 U. S. 481, 498–9.

[17] First Employers' Liability Cases, 207 U. S. 463; *Gibbons* v. *Ogden*, 9 Wheat. 1, 203–204: Within the state power is "that immense mass of legislation which embraces everything within the territory of a state, not surrendered to the general government: all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, etc., are component parts of this mass. No direct general power over these objects is granted to Congress; and, consequently, they remain subject to state legislation. If the legislative power of the Union can reach them it must be for national purposes; it must be where the power is expressly given for a special purpose or is clearly incidental to some power which is expressly given."

[18] 234 U. S. 353.

Commission subsequent to the one involved in the Shreveport case, show that the Commission has most noticeably refrained from the slightest attempt to claim the right to pass on the reasonableness of intrastate rates. They also call attention to the necessity for such right to enable the Commission to properly determine whether a state-made rate gives undue preference to state commerce when compared with a rate applicable to interstate commerce. It is asserted that undue preference must rest upon the fact that the state rate complained of is less than a reasonable maximum rate, but this claim is not supported by *American Express Company* v. *Caldwell*,[19] in which the court makes this statement: "The finding that discrimination exists and that interstate rates are reasonable does not necessarily imply finding that the intrastate rates are unreasonable. Both rates may lie within the zone of reasonableness and yet involve discrimination." A previous decision of the court is cited in support of the language last quoted,[20] but the language of the prior opinion,[21] referred to as ground for the authority, is as follows:

> We agree with plaintiff (the Interstate Commerce Commission) that a charge may be perfectly reasonable under Section 1 and yet may create unjust discrimination or unreasonable preference under Sections 2 and 3. As was said by Mr. Justice Blackburn in *Great Western Railroad Co.* v. *Sutton L. R.*, 4 H. L., 226, 239: "When it is sought to show the charge is extortionate as being contrary to the statuable obligation to charge equally, it is immaterial whether the charge is reasonable or not; it is enough to show that the company carried for some other person or class of persons at a lower charge during the period throughout which the party complaining was charged more under the like circumstances."

The language last quoted seems to indicate that the charge exacted from the complaining party, while it might be reasonable in and of itself, did nevertheless, subject the complaining party to unjust discrimination because of other persons paying a lower rate at the same time for a like service. In other words, the reasonable rate complained of could not create discrimination against anybody save the party paying it, and that would be due to the lower rates enjoyed by other persons. It is therefore claimed, that a rate found by a state to be reasonable as a maximum charge for transportation

[19] *American Express Company* v. *Caldwell*, 244 U. S. 617–624.

[20] *Interstate Commerce Commission* v. *Baltimore and Ohio Railroad Company*, 145 U. S. 263–277.

[21] 145 U. S. 277.

between two points within its borders cannot result in undue preference or subject anyone to unjust discrimination. If unjust discrimination results thereby it must be due to the maladjustment of the interstate rates. It is also said that a rate found by the state to be reasonable as a maximum cannot properly be increased by the mere declaration of the Interstate Commerce Commission that it gives an undue preference to state commerce, the removal of which is required by an advance in the state rate, as such action on the part of the Commission can in no way be considered as passing upon the amount of said rate.

In this connection it is said that the Commission has given greater weight to the act of the state as establishing a case of undue preference than it has in considering the act of a carrier responsible for a like rate adjustment. Section 3 of the act to regulate commerce,[22] in dealing with undue preferences and advantages, does not specify the character of commerce that may bring about the undue preference. It may be found that certain interstate commerce may cast a burden upon other interstate commerce by reason of the maladjustment of rates, and thus bring about a violation of this section. And in view of this fact, it is then said that the Interstate Commerce Commission has in numerous cases[23] (of which the 2 cited in the footnotes are illustrative) held that a carrier may make a rate between a given point of origin and a destination on its line, without regard to the rate of another carrier from another point of origin to the same destination, and if the rate of the first carrier is not met by the second, neither is subject to the claim that it has violated the provisions of Section 3. And this has been the settled rule in the Supreme Court for many years.[24] But, say the opponents of federal control, because the state requires a carrier to establish a reasonable

[22] "That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

[23] *Railroad Commission of Kansas* v. *Atchison, Topeka and Santa Fe Railway Company*, 22 I. C. C. 407–416; *Blodgett Milling Company* v. *Chicago, Milwaukee and St. Paul Railway Company*, 23 I. C. C. 448–449.

[24] *East Tennessee, Virginia and Georgia Railway Company* v. *Interstate Commerce Commission*, 181 U. S. 1, 18, 19, 20.

maximum rate for intrastate commerce, which a different interstate carrier declines to meet in its interstate business, the carrier obeying the act of the state legislature may be held in violation of Section 3, which forbids undue preferences, even though the transportation within the state is specifically eliminated from the application of the Act to Regulate Commerce.[25] It is said that both the court and the Commission have lost sight of the distinction between the application of the act to an interstate carrier, and the lack of power under the act to interfere with intrastate transportation handled by the interstate carrier; that transportation which may move free from the restrictions of the Act to Regulate Commerce can not possibly subject transportation governed by the act to unjust discrimination. The following illustration is claimed to demonstrate the unsoundness of the decision, both of the Commission and the court in the Shreveport case:

If carriers operating between Texarkana, Arkansas, and Dallas, Texas, and not serving Shreveport, decide to establish a rate between the first two points, they may do so provided the rate is not less than the cost of transportation, and other carriers operating between Shreveport and Dallas may meet the rate or not, as they see fit. If they fail to meet it and complaint is made before the Commission, and the latter adheres to its numerous decisions on the question, neither the carriers operating between Texarkana, Arkansas, and Dallas, nor the carriers operating between Shreveport and Dallas have violated Section 3. But if the carriers operating between Texarkana, Texas, and Dallas apply the rate between those points established by the State of Texas, and the carriers operating between Shreveport and Dallas do not see fit to meet it, and shippers of Shreveport complain of undue preference in favor of the shippers of Texarkana, Texas, the Interstate Commerce Commission may find an undue preference has been created by the carriers obeying the act of the State of Texas, although the Commission would have relieved the carriers from the charge if they had established the rate from Texarkana, Arkansas, or Texarkana, Texas, to Dallas volun-

[25] Section 1 of the Act to Regulate Commerce provides in part: "Provided, however, That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid. . . . . "

tarily. A recent case in the Supreme Court, not yet officially reported,[26] seems to indicate that it would hold the carriers responsible for the voluntary establishment of an intrastate rate, if declared to unduly prefer intrastate commerce over interstate commerce.

These considerations, say the opponents of complete federal regulation, will require the court to adopt a different construction of the law whenever the question of the power of the Interstate Commerce Commission to determine the amount of a state-made rate is presented, and, as the lack of power in the federal government to determine the amount of an intrastate rate has been repeatedly declared by the Supreme Court, the only way by which that power which is essential to complete nationalization can properly be exercised, is through the medium of a Constitutional amendment.

It will be observed that the first two grounds upon which the opponents of federal control challenge the existence of the federal power necessary to bring it about, were not decided in the Shreveport,[27] the American Express Co.,[28] or the Illinois Public Utilities Commission cases,[29] and are therefore still open.

The third objection of the opponents of complete federal control raises a question of power resulting from an attempt to apply the decision in the Shreveport case. It is claimed that a reasonable maximum rate can not give an undue preference or create unjust discrimination against any other rate. This position is somewhat shaken by the decision in the American Express Company case, *supra*, but even so, it is said that whenever the Interstate Commerce Commission determines that a rate declared by a state to be reasonable as a maximum for transportation subjects interstate transportation to unreasonable prejudice and disadvantage because the interstate rate is higher than the reasonable maximum rate set by the state, the removal of the preference or disadvantage requires an advance in the state rate. This is essentially true, whenever in the same decision the Interstate Commerce Commission declares the higher interstate rate to be reasonable as a maximum.

When the state rate is advanced there is no tribunal before

[26] *Illinois Central Railroad* v. *Public Utilities Commission of Illinois*, January 14, 1918.

[27] 234 U. S. 342.

[28] 244 U. S. 617.

[29] *See* citation 26.

which a shipper enjoying that rate can go to test the reasonableness of it. If he appears before the Interstate Commerce Commission in the proceeding and attempts to show that the state rate is reasonble as a maximum, he is met with the statement that the Commission has no control over the rate in question, or the transportation moving under it, and that testimony relating to the matter is incompetent. The shipper can not go before a tribunal created by the state because under the decision in the Shreveport case, the act of the Interstate Commerce Commission is final. And thus the state shipper is put in this position: his rate is increased witnout an opportunity to be heard as to whether the advanced rate is just and reasonable as a maximum. The Act to Regulate Commerce declares every unjust and unreasonable rate to be unlawful. The state laws so declare. And it has long been the doctrine of the Supreme Court that no carrier could establish a state rate higher than the service was reasonably worth,[30] and for more than 30 years we have had the statutory declaration that unreasonable interstate rates were unlawful.[31] In other words, the shipper has the right to a reasonable rate, and having that right, unless he is provided a remedy for its protection, he has been denied due process.

The arguments of the opponents of complete national regulation, if not sound, are at least plausible, and discussion will not subside until the Supreme Court specifically passes upon the disputed questions.

If, however, the doctrine of the Shreveport case is sound, and the court continues to follow the principle announced, the opponents of complete national regulation have slight hope for the successful maintenance of their contentions. The three questions of power would then be answered in favor of the federal government, and especially the third, by the enactment of a law giving to the Interstate Commerce Commission the power, whenever complaint is made that a given state rate discriminates against interstate rates, to declare that ascertainment of the reasonableness of such state rate is essential to a correct determination of the existence or the

[30] *Smythe* v. *Ames*, 169 U. S. 466.

[31] Section 1 of the Act to Regulate Commerce provides in part: "All charges made for any service rendered or to be rendered in the transportation of passengers or property . . . . as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

non-existence of the preference or discrimination, and thereupon to determine the reasonableness or the unreasonableness of the state rate as fully and completely as if dealing with an interstate rate.

NATIONALIZATION OF RATES A CONTINUING PROBLEM

It would seem to be immaterial, so far as federal power to nationalize rates is considered, whether the federal government continues to operate the railroads under the proclamation of the President, under date of December 26, 1917, or whether the federal government should finally purchase the railroads.

In any event the power to regulate, control, operate, or own must come from Congress, and it can exercise only the powers that it finds in the Constitution.

The joint resolution of April 6, 1917, declaring war against Germany, the joint resolution of December 7, 1917, declaring war against Austria, and Section 1 of the act approved August 29, 1917, authorizing the President in time of war to take possession of any system or systems of transportation (under which provisions the President found the authority for his proclamation), gave no greater power to the President than Congress could have given to any other officer of the government or to any tribunal created by it.

Congress must, in the first instance, decide whether or not it will exercise any power granted to it under the Constitution. When it determines to exercise a given power it may choose the form of the legislation that it deems necessary and appropriate for the exercise of the power.[32] Conditions existing at the time of the exercise of a power may determine in some instances whether the legislation adopted was necessary and appropriate to carry out such power. If the subject matter of the legislation is covered by a grant of power in the Constitution, and there appears to be some relation between the power and the legislation adopted, the legislation will be deemed to be necessary and appropriate.[33]

The power to declare a war is one of extreme responsibility and only compelling necessity will prompt the exercise of it. A state of

[32] Article I, Section 8 of the Constitution, contains grant of powers to Congress, the last clause of which is as follows: "And to make all laws which shall be necessary and proper for carrying into execution the foregoing powers; and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof." *Legal Tender Cases*, 12 Wall. 538; *Northern Securities Company* v. *United States*, 193 U. S. 343.

[33] *McCulloch* v. *Maryland*, 4 Wheat. 418; *Logan* v. *United States*, 144 U. S. 82.

war creates an emergency that would justify, as appropriate and necessary, any kind of an act that would even remotely assist in the prosecution of the war. Under war conditions, a declaration by Congress that the railroads and other common carriers of the country were necessary for public use in carrying on the war would justify the most liberal construction of the law by which such properties were converted to the public use, as being necessary and appropriate to get the full use of the power. This is not to say, however, that limitations on Congressional action can be disregarded. While it is for Congress to declare the necessity for converting private property to public use, it must observe the fifth amendment when it comes to the matter of compensation.[34] And during the war, or after the war ends, if Congress should determine that full and complete regulation of commerce among the states requires ownership by the government, it could, under the provisions of the Constitution authorizing it to pass such rules and regulations essential to the carrying out of that power, properly provide for the manner in which the change of ownership could be brought about, subject at all times to the limiting provisions of the Constitution.

Then again, the government might at the termination of the war, by appropriate legislation take over the ownership of the carriers on the ground that they were necessary and essential for carrying on the proper functions of the government. They might properly be considered as necessary to the equipment and maintenance of the army and the navy, to the movement of troops, or materials and supplies to and from forts, arsenals, or other government factories, or buildings, as well as for the handling of United States mails. But in these instances, a transfer of the title to the real estate located in the various states would not give to the federal government complete legislative control thereover, unless the legislatures of the various states consented thereto.[35] The federal government would

[34] *Monongahela Navigation Company* v. *United States*, 148 U. S. 312.

[35] The Constitution, by Article I, Section 8, clauses 12 to 17, inclusive, provides as follows:

"The Congress shall have power . . . .

"To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years."

"To provide and maintain a Navy."

"To make rules for the government and regulation of the land and naval forces."

own such property the same as any other proprietor. It is not clear that the rule as to the legislative control over the real estate in the different states is any different if the federal government should take over the ownership of the railroads under the power in the commerce clause of the Constitution.

Even though the government becomes the owner of the railroads it is not believed that the President, or any other officer of the government who might be designated, or any tribunal created, could establish rates for the transportation of goods of private citizens, except on the basis of reasonableness. It would not be in keeping with the spirit of American institutions to permit the government to take over the railroads and then charge the shipping public rates that were unreasonable.

Rail transportation has become an absolute necessity to the commerce of the country. It is necessary because it is not possible for every community to produce everything it consumes; therefore tne surpluses in other communities must be moved to the communities requiring them. If Congress should give to the President, or other officer of the government, or some tribunal created thereby, the power to establish rates without an opportunity for the parties in interest to be heard, the grant would be one of doubtful validity. But if Congress does possess the power to pass an act of that character, it seems clear that arbitrary action on the part of the person or tribunal exercising the power would not be immune from judicial interference.[36]

"To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions."

"To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress."

"To exercise exclusive legislation in all cases whatsoever, ... over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings." *Fort Leavenworth Railroad Company* v. *Lowe*, 114 U. S. 331; *Chicago, etc., Railroad Company* v. *McGlinn*, 114 U. S. 545.

By Article I, Section 8, clause 7, the Constitution provides: "The Congress shall have power. . . . .

"To establish post offices and post roads." *Cleveland Railroad Company* v. *Franklin Canal Company*, 5 Fed. Cases 2890.

[36] *Degge* v. *Hitchcock*, 229 U. S. 162, 170–171.